



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 25, 1993

Honorable Mike Driscoll
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002-1891

Letter Opinion No. 93-11

Re: Whether the Harris County Flood
Control District has a right-of-way to build
flood control works across Harris County
roads, and related questions (RQ-302)

Dear Mr. Driscoll:

You state that Harris County and the Harris County Flood Control District have asked whether each may use right of way acquired by the other. Your first question on this matter is as follows:

Does the Harris County Flood Control District have a statutory right to extend ditches across all roads within Harris County, consistent with the rights found to exist in the case of Tennessee Products Pipeline Co. . . . ?

The Harris County Flood Control District¹ was created pursuant to article XVI, section 59 of the Texas Constitution by a special law adopted in 1937. Acts 1937, 45th Leg., ch. 360, § 1. Article XVI, section 59 of the Texas Constitution authorizes the creation of conservation and reclamation districts and removes from them the limitation on indebtedness established by article III, section 52 of the Texas Constitution. Tex. Const. art. XVI, § 59, interp. commentary (Vernon 1955). Thus, the Harris County Flood Control District has authority to issue bonds to finance its projects and to raise taxes to pay the principal and interest. Tex. Const. art. XVI, § 59(c); Acts 1937, 45th Leg., ch. 360, §§ 5 - 7, at 716-18.

The special law creating the flood control district establishes the commissioners court of Harris County as its governing body and authorizes the court to develop and implement plans to conserve and reclaim flood-lands, and to control the rivers, streams, and flood-waters of Harris County. Acts 1937, 45th Leg., ch. 360, § 1. The district may acquire land and rights and interests in land by gift, devise, purchase, or condemnation, and may sell, trade, or otherwise dispose of land or other property or rights therein that are no longer needed for a project or flood control purposes. *Id.* § 2. It also has the power of eminent domain for acquiring property within the boundaries of the district,

¹See *Harris County Flood Control Dist. v. Mann*, 140 S.W.2d 1098 (Tex. 1940) (addressing constitutionality of statute creating Harris County Flood Control District).

necessary or convenient to the exercise of the rights, powers, privileges, and functions conferred upon it by law. *Id.* § 10. Section 9 of the law creating the district states in relevant part:

In the prosecution of the flood control plans of the Harris County Flood Control District, the District shall be recognized to have the right to make use of the bed and banks of the bayous, rivers, and streams lying within the District, subject to the prior right and authority of the Harris County Houston Ship Channel Navigation District over the navigable streams in the Navigation District and the submerged lands heretofore given by the State of Texas to that Navigation District.

The Harris County Flood Control District shall have a right of way and easement over and across the roads and highways of the State and its subdivisions for the construction and maintenance of the flood control projects of the District, subject, however, to the concurrence of the State Highway Commission whenever such projects require the relocation or bridging of State highways.

The District shall have the power and authority to overflow or inundate any public lands and public property, and to require the relocation of roads and highways, in the manner and to the extent permitted to any district organized under General Laws, pursuant to Section 59 of Article XVI of the Constitution of this State, as amended.²

This provision gives the district "a right of way and easement over and across the roads and highways" of Harris County "for the construction and maintenance of the flood control projects" of the district.³ However, the Harris County Road Law, a

²Section 11.044 of the Water Code provides in part:

(b) If any public road, highway, or public bridge is located on the ground necessary for a dam site, reservoir, or lake, the commissioners court shall change the road and remove the bridge so that it does not interfere with the construction of the proposed dam, reservoir, or lake. The party desiring to construct the dam, reservoir, or lake shall pay the expense of moving the bridge or roadway.

See also Lower Nueces River Water Supply Dist. v. Live Oak County, 312 S.W.2d 696 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.) (water supply district had a right under statute to inundate road and bridge and commissioners court had duty under statute to remove bridge).

³This easement over county roads in Harris County is granted to the district by statute. *See generally County of Harris v. Tennessee Prods. Pipe Line Co.*, 332 S.W.2d 777 (Tex. Civ. App.—Houston [1st Dist.] 1960, no writ). Easements over, along, or across any public road or highway in Harris County may also be granted by the commissioners court of the county, subject to reasonable conditions or

comprehensive special road law enacted in 1913, gives the Harris County Commissioners Court "control of all roads, bridges, drains, ditches, culverts and all works and constructions incident to its roads, bridges, and drainage." Acts 1913, 33d Leg., ch. 17, §§ 1 - 2. Its provisions are cumulative with general laws on the same subject that are not in conflict. *Id.* § 33; see V.T.C.S. art. 2351, §§ 1, 2, art. 6702-1, § 2.002.

You point out an apparent conflict between the two special laws as to the authority of Harris County and the flood control district over county roads. Harris County has general authority to construct and maintain county roads, while the district has a right-of-way and easement to require the relocation of roads within the district when necessary for flood control purposes. You indicate that *County of Harris v. Tennessee Prods. Pipe Line Co.*, 332 S.W.2d 777 (Tex Civ. App.--Houston [1st Dist.] 1960, no writ) is relevant to resolving this conflict.

The *Tennessee Products Pipe Line Co.* case dealt with the right of pipeline companies to lay pipelines across county roads in Harris County. The parties to the suit agreed that the Commissioners Court of Harris County had general control over county roads and the power to make and enforce reasonable rules for working the roads. 332 S.W.2d at 779, 782. The court determined that the county had the right to enforce reasonable regulations in connection with the construction and maintenance of pipelines crossing its roads, but it had no right to use its regulatory power in a manner that would deny pipelines the right to cross under roads and highways under its control. *Id.*; see also Attorney General Opinions M-56 (1967) (relies on *Tennessee Products Pipe Line Co.* in resolving apparent conflict between Harris County Road Law and laws establishing fresh water supply districts); M-56A (1968) (clarifying Attorney General Opinion M-56 as to the kind of facilities fresh water supply district may build).

The two statutes that you inquire about are in a different relationship than those addressed in *Tennessee Products Pipe Line Co.* That case involved a conflict between a public and private entity, while the present conflict concerns two public entities both governed by the Commissioners Court of Harris County. The Harris County Flood Control District was established as a separate entity under article XVI, section 59 to remove Harris County flood control projects from the limits on public debt established by article III, section 52, but not necessarily to make it completely separate from the county government. See generally *Harris County Flood Control Dist. v. Mann*, 140 S.W.2d 1098 (Tex. 1940) (Harris County Flood Control District is a state agency, but commissioners court, its governing body, performs county business). The flood control law grants the Harris County Commissioners Court powers "[i]n addition to the powers

(footnote continued)

restrictions prescribed by the court. Acts 1947, 50th Leg., ch. 205, § 8, at 361 (adding section 7A to Harris County Road Law).

given to the Commissioners Court by General Law," Acts 1937, 45th Leg., ch. 360, § 2, at 715, suggesting that the legislature intended the commissioners court to coordinate its responsibilities under the flood control statute with its responsibilities under other statutes.

To answer your specific question, the flood control district does have an express easement "over and across the roads and highways of the State and its subdivisions," including Harris County. Thus, the flood control district could dig ditches over the roads and highways of Harris County "for the construction and maintenance" of the district's flood control projects, but not for other purposes. Moreover, if a flood control project required the bridging or relocation of a state highway located in Harris County, the district could use the easement only with the concurrence of the Highway Commission.

The Harris County Road Law also places some restrictions on the district's use of easements over county roads. In 1983, the legislature amended section 2 of that law to read in part:

Subject to the provisions of this Act, the Commissioners' Court of Harris County shall have the power and right to adopt such rules and regulations for: (1) the proper construction and maintenance of its roads, bridges and drainage as it may see proper; (2) the construction and maintenance of driveways, *culverts, bridges, and other structures within the county road right-of-way to provide access to and from the traveled portion of the road to property adjoining such road* which may include but shall not be limited to the following: (a) to require any individual or entity to give notice to Harris County prior to the placement, removal, or relocation of driveways, culverts, bridges, and other structures within the county road right-of-way; (b) to set requirements for the size, type, and location of such driveways, culverts, bridges, and other structures within the county road right-of-way; (3) the laying, constructing, maintaining and repairing of pipelines, lines, mains, cables, or other public utility facilities in, under, along, across, and/or over the county road right-of-way by any individual or entity authorized to do so by law . . . [which may require notice to Harris County and may set minimum requirements for such activities]; (4) the drainage of land into a road, road right-of-way, or appurtenant drainage facility; (5) the collection of reasonable fees set by the Commissioners' Court from any person or entity required by such rules and regulations to give notice to Harris County. . . .

Acts 1983, 68th Leg., ch. 801, at 9643-45 (emphasis added).

We do not know whether the flood control district uses its easements over county roads for any of the structures or purposes described in section 2 of the Harris County Road Law. The Harris County Flood Control District has a statutory right to build flood control works across county roads, but to the extent its projects are within section 2 of the

Harris County Road Law, they must comply with any applicable regulations adopted under that provision.

Your second question is as follows:

Is there any authority which would allow Harris County the right to cross, for road purposes, land owned in fee or easement by Harris County Flood Control District without first obtaining written permission from such District?

The law establishing the flood control district was enacted later in time than the Harris County Road Law, and in the event of conflict, controls over the earlier-enacted statute, the Harris County Road Law. *Dallas v. Brown*, 475 S.W.2d 833 (Tex. Civ. App.--Dallas 1971, writ ref'd n.r.e.). Section 9 of the act creating the flood control district gives the district "a right of way and easement over and across the roads and highways of the State and its subdivisions," while we have found no law giving Harris County an easement for roads over land and easements owned by the Harris County Flood Control District. Acts 1937, 45th Leg., ch. 360, § 9, at 719. In addition, section 9 of the flood control law expressly gives two other agencies superior rights over specific public property within the district: the Harris County Houston Ship Channel Navigation District with respect to the beds and banks of bayous, rivers, and streams, and the State Highway Commission with respect to easements over state highways that would require the relocation or bridging of the highway. No such superiority is accorded to Harris County for road purposes. *See also Harris County Flood Control Dist. v. Shell Pipeline Corp.*, 591 S.W.2d 798 (Tex. 1979) (easement in public road granted pipeline company prior to creation of flood control district is dominant to right of district to cross roadway). We conclude that Harris County may not build roads over land or easements owned by the district without the district's permission.

Your third question is as follows:

If a written instrument to cross District property by the County is required, must the County pay the District the fair market value as determined by an appraisal, as apparently required by § 272.001(b)(6) of the Local Government Code?

The district's concurrence, like all substantive actions of the Harris County Commissioners Court, should be reflected by an order of the commissioners court. *See also Union Properties Co. v. Klein*, 333 S.W.2d 864 (Tex. Civ. App.--Eastland 1960, writ ref'd n.r.e.) (easement is generally based on a voluntary grant required to be in writing). *See generally* 35 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 5.11 (Texas Practice 1989).

Section 272.001 of the Local Government Code establishes that a political subdivision may not sell land or exchange it for other land without first giving the public notice of the offer of land and an opportunity to bid for it. Gov't Code § 272.001(a).

Subsection (b) of section 272.001 excepts certain sales and exchanges of land from the general requirement:

The notice and bidding requirements . . . do not apply to the types of land and real property interests described by this subsection and owned by a political subdivision. That land and those interests may not be conveyed, sold, or exchanged for less than the fair market value of the land or interest. The fair market value is determined by an appraisal obtained by the political subdivision that owns the land or interest, and the appraisal is conclusive of the fair market value of the land or interest. This subsection applies to:

....

(3) an *easement* for which one or more abutting property owners own the underlying fee simple;

(4) land or a real property interest originally acquired for streets, *rights-of-way*, or *easements*

....

(6) a real property interest conveyed to a governmental entity that has the power of eminent domain.

Local Gov't Code § 272.001(b) (emphasis added).

The county has the power of eminent domain for road purposes. *See* Acts 1947, 50th Leg., ch. 205, at 361 (amending Harris County Road Law); V.T.C.S. art. 6702-1, §§ 4.301 - .302. It is well established that an easement is an interest in land. *McLennan County v. Sinclair Pipe Line Co.*, 323 S.W.2d 471 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.). In addition, subsections 272.001(b)(3) and (4) expressly refer to certain easements, showing that easements are "land" or "real property interests" within section 272.001. The requirements of section 272.001(b)(6) apply to the transfer of an easement by the district to the county. *See generally* Attorney General Opinions H-1188 (1978); H-108 (1973).

Finally, you ask:

Would execution by the District of an agreement granting to the County joint use rights in its property constitute a violation of Article III, Section 52 of the Texas Constitution?

Article III, section 52 of the Texas Constitution prohibits a political subdivision from gratuitously granting public money or credit to any individual or private commercial enterprise. *See Seydler v. Border*, 115 S.W.2d 702, 704 (Tex. Civ. App.—Galveston 1938, writ ref'd); *Bland v. City of Taylor*, 37 S.W.2d 291, 292-93 (Tex. Civ. App.—Austin 1931), *aff'd sub nom. Davis v. Taylor*, 67 S.W.2d 1033 (Tex. 1934). *But see* Tex. Const.

art. III, § 52-a (1987 amendment to constitution concerning use of public funds for economic development). This provision also prohibits a grant of public money between political subdivisions. *See Harris County Flood Control Dist. v. Mann*, 140 S.W.2d 1098, 1103-04 (Tex. 1940). However, it does not prohibit *quid pro quo* contracts between political subdivisions designed to carry out a shared governmental purpose. *San Antonio River Auth. v. Shepperd*, 299 S.W.2d 920, 928 (Tex. 1957). Thus, the answer to your question would depend on the facts of the particular joint use.

S U M M A R Y

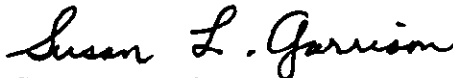
The Harris County Flood Control District is authorized to build flood control works across Harris County roads and highways subject to limits in the law governing the flood control district and applicable regulations adopted under section 2 of the Harris County Road Law.

Harris County may not construct roads across property controlled by the district, without the written concurrence of the district.

Local Government Code section 272.001(b)(6) requires that land owned by a political subdivision of the state, such as the district, may be conveyed to another "governmental entity that has the power of eminent domain," such as the county, provided the property is appraised and transferred for no less than fair market value.

Article III, section 52 of the Texas Constitution does not prohibit *quid pro quo* contracts between political subdivisions designed to carry out a shared governmental purpose.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee